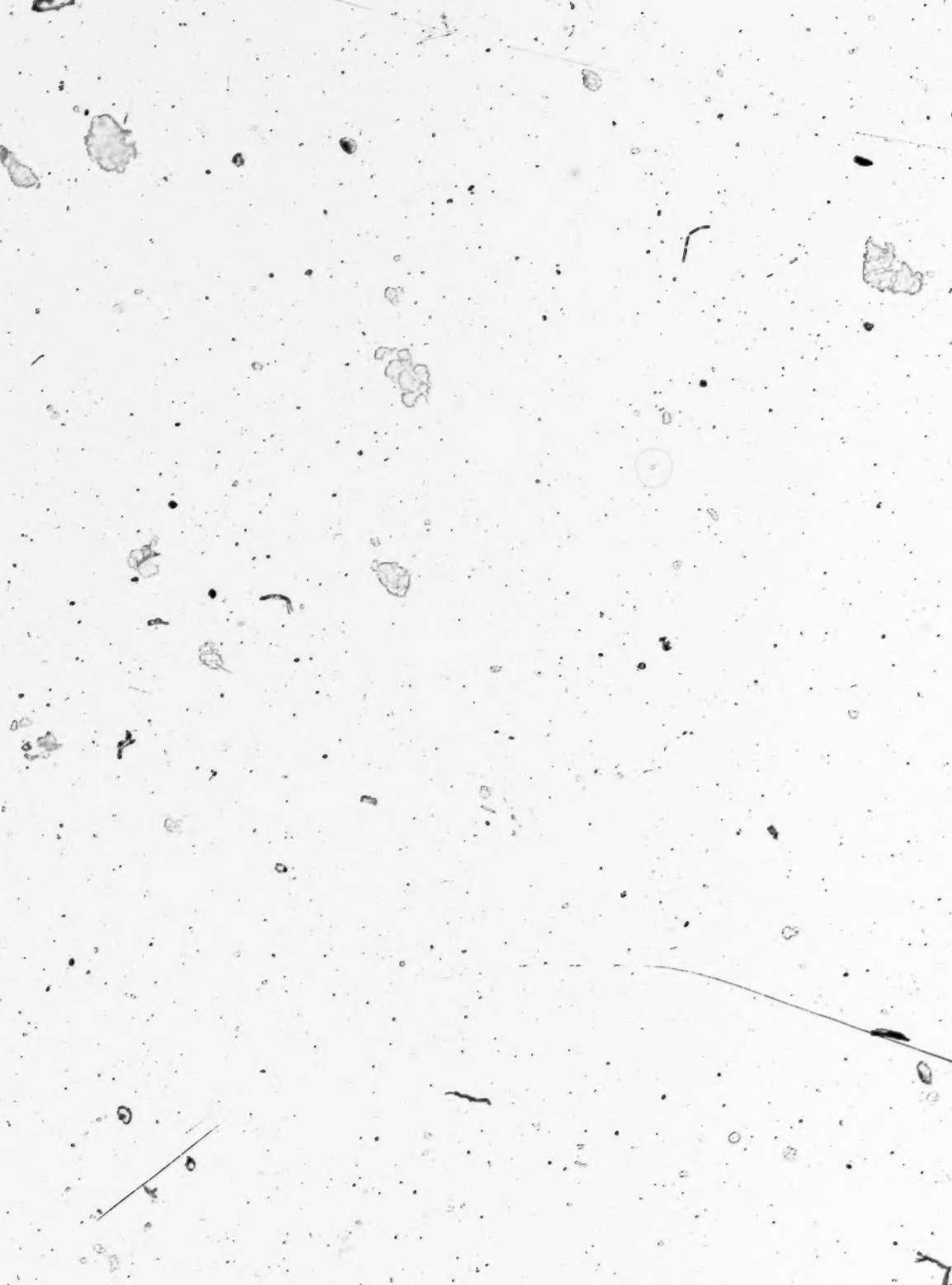


No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1939

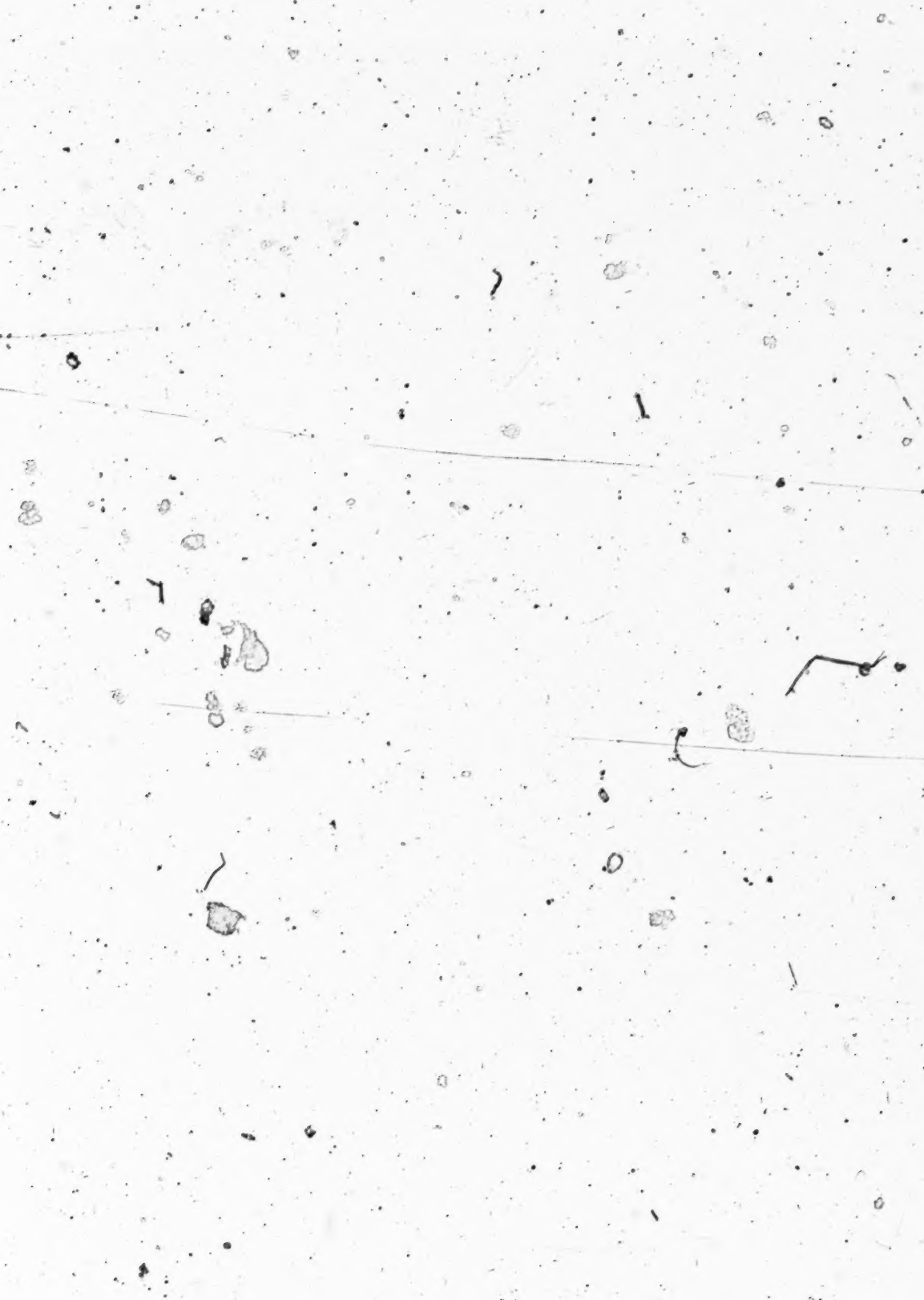
UNITED STATES OF AMERICA, *Petitioner,*

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, *Respondents.*

RESPONSE TO THE PETITION OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BOWER BROADDUS,
JULIAN B. FITE,
Attorneys for Respondents.



INDEX.

Subject Index.

PAGE

Question presented 2

Statement 3

Reasons for refusing the writ 8

(1) This Court will not take matters under consideration which are not matters of great public concern . . . 8

(2) The Tenth Circuit Court of Appeals was correct in holding that the balance fixed by the District Court for the Western Division of the Western District of Missouri was binding on the District Court in Oklahoma. This holding is not a matter presenting any unsettled question of law.

(A) That the Indian Tribes, by coming into the District Court in Missouri and litigating the counterclaim of the respondents on its merits, waived their immunity is well settled by the decisions of this Court 10

(B) That an Act of the character of Section 18 of the Act of April 26, 1906, in conferring jurisdiction on one court does not thereby confer exclusive jurisdiction is well settled by the decisions of this Court . . . 12

(C) The question raised in this Court not having been raised in the court below must be considered as having been waived and cannot be raised here 16

(3) It is settled by the decisions of this Court that there was no error in rendering judgment in favor of the intervener 18

Conclusion 19

Authorities.

Cases:

Ames v. *Kansas*, 111 U. S. 449, 464, 28 L. ed. 482, 488 15

Atchison, Topeka & Santa Fe Ry. Co. v. *Sowers*, 231 U. S. 54, 58 L. ed. 695 15

PAGE

Bull v. *United States*, 295 U. S. 247, 79 L. ed. 1421 . . 11
DeGroot v. *United States*, 4 Wall. 419-431, 18 L. ed. 700-702 11
Dexter and Carpenter v. *Kunglig Jarnvagsstyrelsen*, 43 Fed. (2d) 705 10
French v. *Gapen*, 105 U. S. 509, 26 L. ed. 951 18
Kenney v. *Supreme Lodge*, 253 U. S. 411, 415, 64 L. ed. 638, 641 15
Luckenbach Steamship Company v. *The Thekla*, 266 U. S. 328, 69 L. ed. 313 10
People of Porto Rico v. *Ramos*, 232 U. S. 627, 58 L. ed. 763 10
Spokane & Inland Empire v. *Whitley*, 237 U. S. 487, 495, 59 L. ed. 1060 15
Tenn. Coal, Iron & Rubber Co. v. *George*, 233 U. S. 354, 360, 58 L. ed. 997, 1000 15
United States v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479, 80 L. ed. 331, 339 15
United States v. *Eckford*, 6 Wall. 484, 491, 18 L. ed. 920-922 11
United States v. *McDaniel*, 7 Pet. 1, 8 L. ed. 857 11
United States of America v. *Missouri-Kansas & Texas R. R. Co.*, 66 Fed. (2d) 919 4
United States v. *Neustra Senoria De Regla*, 108 U. S. 92, 27 L. ed. 662 10
United States v. *Rea-Read Mill & Elev. Co.*, 171 Fed. 501, 512 14
United States v. *Ringgold*, 8 Pet. 150, 8 L. ed. 899 . . 11

STATUTES:

Act of June 28, 1898, c. 517, 30 Stat. 495 3
Act of April 26, 1906, c. 1876, 34 Stat. 137, Section 18 . . . . . 2, 8, 12, 13
Act of June 16, 1906, 34 Stat. at L. 267 14
Judicial Code, 28 U. S. C. A. 41 (1), Sec. 24 (1) 12

In the Supreme Court of the United States

No. 569
OCTOBER TERM, 1939

UNITED STATES OF AMERICA, *Petitioner,*

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, *Respondents.*

RESPONSE TO THE PETITION OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The United States Fidelity and Guaranty Company, a Corporation, J. M. Bernardin, Trustee of the Central Coal and Coke Company, a Corporation, and the Central Coal and Coke Corporation, a Corporation, respectfully show that a writ of certiorari should not issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered under the date of September

6, 1939, modifying and affirming the judgment of the United States District Court for the Eastern District of Oklahoma.

QUESTION PRESENTED.

Because the question set out in the petition of the United States is much broader than the actual question presented we rephrase that question.

Whether the balance found to be due the counterclaimant in the suit brought by the United States on behalf of the Choctaw-Chickasaw Nations in the District Court in Eastern Oklahoma and transferred by agreement to the District Court in Western Missouri should be re-examined by a District Court in Oklahoma in a subsequent suit, the parties being identical and the same claim and counterclaim having been litigated upon the same evidence, where the action proceeds under Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, in an instance where the force and effect of the adjudication of the merits by the District Court in Western Missouri is first presented by the petition for rehearing after the affirmance of a judgment by the Oklahoma court, giving effect to the determination by the Missouri court. The statute under consideration is as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of

the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits; Provided, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of the dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

"Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe, and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

STATEMENT.

Since the statement contained in the petition of the United States fails, as we see it, to completely put before this Court what took place in the lower courts, we shall reiterate that statement with certain alterations which will be noted in italics.

The Choctaw and Chickasaw Nations, pursuant to authority conferred by the Act of June 28, 1898, c. 517, 30 Stat. 495, executed two separate coal and asphalt leases covering certain tribal lands (R. 119, 45, 50). The United States Fidelity and Guaranty Company became surety on the bond given by the lessee for the faithful performance of its obligations contained in the leases (R. 119, 54-56). The Central Coal and Coke Company, a corporation, organized under the laws of Missouri, acquired the leases

by assignment with the consent of the surety (R. 119, 33-34). The leases provided for payment of advance royalties and deficit royalties (R. 47, 52), *contrary to governing statute as to deficit royalties. United States of America v. Missouri-Kansas & Texas R. R. Co.*, 66 Fed. (2d) 919.

The Central Coal and Coke Company was placed in equity receivership in the United States District Court for the Western District of Missouri (R. 120). *Acting on behalf of the Choctaw and Chickasaw Nations the United States in 1931 filed a claim in an ancillary proceeding in the United States District Court for the Eastern District of Oklahoma, for advance and deficit royalties, totalling $4800.00. Thereafter it was agreed by the parties that the claim filed in the United States District Court for the Eastern District of Oklahoma should be considered as filed in the principal case in the United States Court for the Western District of Missouri* (R. 120, 34-35).

Thereafter a petition in bankruptcy under Section 77-B of the Bankruptcy Act was filed on behalf of the Central Coal and Coke Company.

In 1935 the trustee, appointed pursuant to Section 77-B of the Bankruptcy Act, filed an answer and a counterclaim (R. 26-28, 36-42). *The matter was heard on its merits* (R. 34-44, 56-103). The special master to whom the matter was referred allowed the Government's claim to the extent of $2,000, and the company's counterclaim to the extent of $11,060.90 (R. 121, 56-55). The court denied exceptions to the report and entered judgment that the United States on behalf of the Choctaw and Chickasaw Nations take nothing, and that the claim of the Central Coal and Coke Company be fixed as against such Nations in the sum of $9,060.90, to be secured and collected in the manner pro-

vided by law (R. 121, 66-67). No appeal was taken from that judgment (R. 122).

While the claim and counterclaim were pending in Western Missouri, the United States in its own behalf and for the Choctaw and Chickasaw Nations filed suit in the federal District Court for the Eastern District of Oklahoma against the United States Fidelity and Guaranty Company as surety on the coal company's bond to recover judgment for these identical royalties (R. 11-16). The trustee of the Central Coal and Coke Corporation and its predecessor, the Central Coal and Coke Company, by leave of court (R. 29), *without objection or exception* (R. 29), intervened and pleaded on its merits the same counterclaim which had been litigated in Western Missouri, and also pleaded the judgment rendered in that court (R. 24-26). The surety company by amended answer followed the allegations contained in the petition in intervention (R. 16-18). By way of answer and reply the United States pleaded that the judgment rendered in Western Missouri was void for the reason that the court was without jurisdiction to render judgment against the United States upon the counterclaim, *upon the sole ground that no claim for credit had been presented to the General Accounting Office and by it disallowed* (R. 21-22, 31-32).

At the trial of the case the attorneys for the United States conceded that in the event the judgment of the United States Court for the Western District of Missouri was a valid judgment the United States was not entitled to recover in this action (R. 123). *It appeared at the trial that the same parties appeared as appeared in the Missouri court and that the parties were represented by the same attorneys in both courts* (R. 128), *the same evidence was*

before the District Court in Oklahoma as was before the District Court in Missouri (R. 44).

The trial court determined that the court in Western Missouri had jurisdiction of the parties and of the subject-matter of the claim and counterclaim; that the *finding made* therein was valid and not subject to collateral attack *on the ground that no claim was proved to have been filed with the General Accounting Office and by it disallowed* prior to the findings on the counterclaim (R. 123-125, Conclusions of Law) (R. 130-132, Opinion); and that the interveners were entitled to an affirmative judgment against the Indian tribes in the amount determined by the court in Missouri, namely, $9,060.90, with interest and costs *to be secured and collected in the manner provided by law* (R. 134).

The United States appealed to the Circuit Court of Appeals for the Tenth Circuit. In that court the United States abandoned the ground presented to the trial court, that the judgment of the District Court in Missouri was void because no claim had been presented to the General Accounting Office and by it disallowed. In the Circuit Court of Appeals so far as the matter is involved here the United States maintained that the District Court in Missouri lacked jurisdiction to hear the controversy at all under the terms of the Act of April 26, 1906, which the United States now conceded to be the governing statute (R. 145-148). *Likewise the United States contended that if the District Court of Missouri had jurisdiction to hear the controversy it had no jurisdiction to determine what might be due the counterclaimants from the Indian tribes* (R. 148).

The judgment of the District Court, except as to interest and costs, was affirmed by the Circuit Court of Appeals. That court held, *inter alia: (1)* that "the Choctaw

and Chickasaw Nations are sovereigns immune to civil suit except when expressly authorized"; *(2)* that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indian Nations because no such judgment was rendered; "the judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim * * * and fixed the balance due on the counterclaim * * * and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law"; and *(3)* that this determination of the balance due the Central Coal and Coke Corporation was binding on the court in Oklahoma.

After the opinion of the Circuit Court of Appeals had been handed down the United States filed a petition for rehearing, in which it abandoned the grounds theretofore set up, and upon which the opinion was based, and conceded that the District Court for the Western District of Missouri had jurisdiction of the parties and the subject-matter of the claim and counterclaim and had jurisdiction to determine the amount which was due from the Indian tribes to the counter-claimant (Petition for Rehearing, page 5), *but that it was error for the United States Court for the Eastern District of Oklahoma not to have re-examined the counterclaim on its merits* (Petition for Rehearing, page 6). *This petition was denied November 8, 1939.*

The Circuit Court of Appeals was reviewing the action of the District Court in Oklahoma in a proceeding which was litigated between the same parties by the same attorneys, upon the same claim and counterclaim, and upon the same evidence as had been the controversy in the District Court in Missouri. Nowhere in the record, nor in the petition in this Court for writ of certiorari does any state-

ment appear that had the claim been re-examined by the trial court or by the Circuit Court of Appeals a different judgment would have resulted.

REASONS FOR REFUSING THE WRIT.

The matter raised by the United States as a reason for granting this writ is the question of the ability of the United States District Court sitting in Missouri to make a finding of the amount due a counter-claimant against the Choctaw and Chickasaw Nations in a suit brought by the United States on behalf of those Nations. It is asserted by the United States at this point that the question is governed solely by Section 18 of the Act of April 26, 1906. Not until after the matter was tried on its merits in the United States Court for the Western District of Missouri, re-tried in the United States Court for the Eastern District of Oklahoma, and appealed to the United States Circuit Court of Appeals for the Tenth Circuit, and in each instance lost by the United States, was the question sought to be presented here ever raised.

Before considering the correctness of the decision of the United States Circuit Court of Appeals for the Tenth Circuit in this cause we submit that the controversy herein is not such a matter as this Court is wont to review.

(1) This Court will not take matters under consideration which are not matters of great public concern.

The sole controversy that can exist in this case is whether the last clause of Section 18 of the Act of April 26, 1906, 34 Stat. can be so read as to constitute the United States courts for the Indian Territory, and their successors, United States courts for Oklahoma, the only courts

that can render a finding on which the treasurer of the United States could pay out funds of the Indian tribes. This is a matter of small concern. The Act was passed in April of 1906. More than thirty-three years have elapsed since that time. A complete review of the authorities fails to disclose any case in which the Act has been interpreted as to the counterclaim feature. There are no reported decisions. (A search by the United States government and by these respondents has failed to disclose where any case has ever been filed in the United States court for Oklahoma involving this feature.) Accordingly, it appears that in the thirty-three years since the passage of the Act this is the first case in which the effect of these counterclaim provisions has arisen. The affairs of the Five Civilized Tribes are not as multitudinous now as in the past and the probability of these questions arising in the future is a great deal less than was the probability of their arising in the past. Accordingly, this case involves no matter of great public concern. This court will not take matters under consideration which are not matters of great public concern.

We turn to the consideration of the alleged errors. Of the two errors set out in the petition of the United States only one is discussed.

(2) The Tenth Circuit Court of Appeals was correct in holding that the balance fixed by the District Court for the Western Division of the Western District of Missouri was binding on the District Court in Oklahoma. This holding is not a matter presenting any unsettled question of law.

(A) *That the Indian Tribes, by coming into the District Court in Missouri and litigating the counterclaim of the respondents on its merits, waived their immunity is well settled by the decisions of this Court.*

It is true that the Indian Tribes are sovereigns and immune from suit except when expressly authorized. It is likewise true that a sovereign by coming into court does not subject itself to affirmative liability on a counterclaim. The Indian tribes occupy a position that is most nearly akin to that of a foreign sovereign. Sovereign immunity may be waived when the sovereign contests the counterclaim without pleading immunity, and under such circumstances the sovereign is subject to the judgment on that counterclaim. *Luckenbach Steamship Company* v. *The Thekla*, 266 U. S. 328, 69 L. ed. 313; *United States* v. *Neustra Senoria De Regla*, 108 U. S. 92, 27 L. ed. 662; *People of Porto Rico* v. *Ramos*, 232 U. S. 627, 58 L. ed. 763; *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 Fed. (2d) 705.

In the case of *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrelsen, supra*, prior decisions of which had been twice affirmed by this Court, the court said at page 707:

> "But, where a sovereign invokes the jurisdiction of the court, appears voluntarily, and pleads to a counterclaim interposed, contesting the merits of the respective claims until judgment is rendered against it, the court has jurisdiction, and there is both a waiver of immunity and a consent to the exercise of the jurisdiction."

Under the general law the District Court in Missouri, having acquired jurisdiction of the parties and of the subject-matter, which is admitted by the United States at this time (Petition for Writ of Certiorari, page 5), it had authority to render a judgment or at least make a finding of the amount due.

Even when the United States is the opposing sovereign the court may pass on the merits of a private litigant's defense where, as in the instant case, the matter involved is a claim and counterclaim arising out of the same transaction. *United States* v. *McDaniel*, 7 Pet. 1, 8 L. ed. 857; *United States* v. *Ringgold*, 8 Pet. 150, 8 L. ed. 899; *Bull* v. *United States*, 295 U. S. 247, 79 L. ed. 1421. And if the amount of the counterclaims exceeds the amount of the sovereign's claim the court may determine what amount is due from the sovereign to the counter-claimant. *DeGroot* v. *United States*, 4 Wall. 419-431, 18 L. ed. 700-702; *United States* v. *Eckford*, 6 Wall. 484, 491, 18 L. ed. 920-922.

It is therefore settled law that the United States court for the Western District of Missouri had jurisdiction to render an affirmative finding against the Indian Tribes. That is all that it did do. It is not contended by the United States that this finding would not be a binding adjudication on another United States court, but it is attempted to show that the Act of April 26, 1906, constituted the United States courts for the Indian Territory, and their successors, the United States courts for Oklahoma, a sort of court of claims with regard to claims by and against the Indian tribes. Unless then the United States courts for the Indian Territory, and their successors, United States courts for Oklahoma, are vested with exclusive jurisdiction to render affirmative findings against the Indian tribes the decision of the court below was correct, without going further.

(B) *That an Act of the character of Section 18 of the Act of April 26, 1906, in conferring jurisdiction on one court does not thereby confer exclusive jurisdiction is well settled by the decisions of this Court.*

The Act, Section 18 thereof authorized the Secretary of the Interior to bring suit in the name of the United States, for the use of the Choctaw and Chickasaw Tribes for the collection of any moneys claimed by said Tribes in any of the District Courts of the United States where the party against whom relief was sought may be found. The section further waives immunity of said tribes from counterclaim by defendants in any such proceedings and authorizes an affirmative finding against such Tribes. The jurisdiction to hear suits and counterclaims therein brought by the Secretary of the Interior, in the name of the United States, for moneys claimed by the Choctaw and Chickasaw Tribes is not limited to the United States Territorial Courts of Indian Territory or their successor courts as psuedo courts of claims.

It is well settled that "The United States as guardian of Indian tribes or individual Indians may institute appropriate suits or proceedings for the enforcement of the rights or the protection of the property of its Indian wards"; and the Attorney General of the United States is authorized and empowered to institute or cause to be instituted and thereafter to prosecute all suits or proceedings deemed necessary to safeguard or enforce the rights of the Indian wards. This right necessarily includes the duty of instituting such actions as might be necessary or convenient for the protection of tribal rights in any of the District Courts of the United States, and which courts have general jurisdiction of all actions in which the United States is a party under Sec. 24 (1) of the Judicial Code,

28 U.S.C.A. 41 (1). (Opinion of the Circuit Court of Appeals, R. 145, 146, and authorities therein cited.)

Such was the law at the time of the passage of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and there was at that time in the Attorney General of the United States the right to institute and prosecute such action as might be necessary or convenient in any of the District Courts of the United States.

Section 18 of the Act of April 26, 1906, gave to the Secretary of the Interior a similar right in so far as the Five Civilized Tribes might be concerned by providing:

> "That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land, whether such claim shall arise prior to or after the dissolution of the tribal governments, * * *."

By the use of the above quoted language it was the intent and purpose of Congress to give to the Secretary of the Interior the same right and broad powers to institute a suit in the name of the United States for any of the Five Civilized Tribes, in the appropriate District Court of the United States as were vested in the Attorney General of the United States. As in the case of the Attorney General, it imposed the duty of instituting such action in any District Court where the party against whom the relief was sought might be found. By virtue of this authority and under the imposed duty of the statute the Secretary of the Interior caused to be instituted the proceeding or action in the United States District Court for the Western Division of the Western District of Missouri, and it was stip-

ulated that such proceeding was "under and pursuant to the authority issuing from the Secretary of the Interior and approved by the Attorney General." (R. 89).

The action was a transitory one and was properly brought in the district in which the Central Coal and Coke Company was resident and where relief might be secured. (Opinion of the Circuit Court of Appeals, R. 146.)

This authority of the Secretary of the Interior and the jurisdiction of the United States District Courts was not limited by the additional wording of the section which reads:

> "And the United States courts in the Indian Territory are hereby given jurisdiction to try and determine all such suits."

The purpose of the Act was to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory (34 Stat. 137). At the time of its enactment there was pending before Congress the Enabling Act, authorizing the creation of the State of Oklahoma, and it was known by Congress that statehood was imminent. Act of June 16, 1906, 34 Stat. at L. 267; *United States* v. *Rea-Read Mill & Elev. Co.*, 171 Fed. 501, 512.

The prior enactments fixing the jurisdiction of the Territorial courts of the Indian Territory probably gave to the United States the right to bring actions in said courts in behalf of its Indian wards. However, the matter was not entirely free from doubt; and as the jurisdiction of such Territorial courts was purely statutory it is not unreasonable to assume that Congress thought best to remove all doubt by giving jurisdiction to such courts. *United States* v. *Rea-Read Mill & Elev. Co.*, 171 Fed. 501, 512.

The granting of such jurisdiction to the Territorial Courts does not imply that that jurisdiction is to be exclusive or that the general authority given to the Secretary of the Interior is restricted to such court. (Opinion of Circuit Court of Appeals R. 145.) *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479, 80 L. ed. 331, 339; *Ames* v. *Kansas*, 111 U. S. 449, 464, 28 L. ed. 482, 488.

The act provides that the Secretary of the Interior might bring an action in behalf of any of the Five Civilized Tribes "for the collection of any moneys", which action is a transitory one; and ordinarily the designation of the court in which such action may be brought even though it creates a new right not theretofore existing does not limit the jurisdiction or the authority of other courts to recognize said right or grant relief by virtue thereof. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 231 U. S. 54, 53 L. ed. 695; *Tenn. Coal, Iron & Rubber Co.* v. *George*, 233 U. S. 354, 360, 58 L. ed. 997, 1000; *Kenney* v. *Supreme Lodge*, 253 U. S. 411, 415, 64 L. ed. 638, 641; *Spokane & Inland Empire* v. *Whitley*, 237 U. S. 487, 495, 59 L. ed. 1060.

We conclude that the Secretary of the Interior did, in the name of the United States, institute a proceeding in the Missouri court and had authority so to do, and that such court had jurisdiction of the parties and of the subject-matter.

The immunity of the Tribes from counterclaim was waived by Section 18 of the said Act, which provided that "party defendant in such suit shall have the right to set up and have adjudicated any claim it may have against such Tribe." It is true that the language of the said paragraph also provides "that where suit is pending in United

States courts of the Indian Territory" that such counterclaim may be asserted. However, the Act contemplated the winding up of the affairs of the tribes and its broad purpose and object was to allow not only the prosecution of suits for the benefit of the Tribes in the District Courts of the United States wherever it might be convenient or necessary but also to allow counterclaims therein. The right to assert counterclaim is an inseparable part of the section; and it was the intent and purpose of Congress to permit a complete adjudication of the claims of the parties, and the securing of an affirmative judgment against the Tribes, wherever the suit might be brought.

(C) *The question raised in this Court not having been raised in the court below must be considered as having been waived and cannot be raised here.*

At no time prior to the filing of the petition for rehearing did the United States object to the trial court's refraining from passing on the merits. The reply (R. 21-22) and the answer (R. 31-32) of the United States for the Tribes is grounded on the alleged lack of jurisdiction of the Missouri court to hear the case because no claim had been filed with the General Accounting Office and disallowed prior to the proceeding in Missouri. The Findings of Fact (R. 123) and Conclusions of Law (R. 123-125) and the Opinion (R. 130-132) show that this was the sole contested ground. After the judgment of the trial court the United States filed assignments of error (R. 135-137). In none of these is there any complaint of error in not re-examining the matter on its merits. The only assignment complaining of the effect given the finding of the court in Missouri as to the counterclaim is Assignment No. 8, which complains that that finding was "wholly void and contrary to the evidence and law." (R. 137). Then, so far as the trial

of the case is concerned, the record reflects that no complaint was made as to the court's not having re-examined the merits. The inference appears that the United States claimed no defense as to the merits.

Turning to the appeal we find that none of the designated points raised the question that the lower court should have re-examined the merits of the counterclaim. By point No. 3 (R. 1, 2) the United States complains of the trial court's giving any effect to the finding of the District Court in Missouri because it was "void for want of jurisdiction." It argued that under Section 18 of the Act of April 26, 1906, the Missouri court lacked jurisdiction of the parties and the subject-matter, both as to the claim and counterclaim, and abandoned the ground of the necessity of filing the counterclaim with the General Accounting Office. The Circuit Court of Appeals held that the federal court in Missouri had jurisdiction to do everything that it did (R. 147-148).

In its petition for rehearing the United States conceded that this holding was correct for the purpose of the petition. (Petition for rehearing, page 5.) This concession is carried on into the petition for writ of certiorari filed in this Court.

After an adverse decision the United States presented by petition for rehearing the new ground that the trial court should have re-examined the counterclaim on its merits. Nothing in the designated points raised this question. The designation of points on which an appellant intends to rely does not serve the identical purpose as did the assignments of error, and if the record, as brought before the appellate court, is sufficient to cover any new point it may properly be considered. However, there must be

some place, even under the relaxed rules of procedure, where an appellant is precluded from raising questions which were not raised in the court below and, accordingly, could not have been the basis of the decision of which such appellant complains.

We now consider the second assignment of error.

(3) It is settled by the decisions of this Court that there was no error in rendering judgment in favor of the intervener.

The petition of the United States assigns as error but does not discuss the action of the Circuit Court of Appeals in holding that the Court in Oklahoma had jurisdiction to render an affirmative judgment in favor of an "intervener". It is settled law, in this Court, that an intervener coming into a case without objections should be treated for all intents and purposes as though it had been made a party defendant and had set up its matters in defense by way of counterclaim. *French* v. *Gapen*, 105 U. S. 509, 26 L. ed. 951. And was so found by the court below, 106 Fed. (2d) 804, 810.

Conclusion.

This case presents the novel situation that it was first heard on the merits. Ever since that time the United States has been insisting that the various courts did not have the right to consider the matter on its merits, but now complains of their failure to reconsider the merits as grounds for obtaining a review by this Court.

Briefly, in summation, this matter was considered on its merits by a special master appointed by the United States court for the Western District of Missouri, to which court the controversy had been removed from Oklahoma by agreement of the parties; the United States excepted to the findings of the master and these findings were confirmed by the judge of the court. The United States did not appeal, but proceeded to litigate in the United States court in Oklahoma the right of the surety to avail itself of the defenses of its principal, maintaining that the judgment in the Missouri court was void because the claim of the principal had not been presented to the General Accounting Office and disallowed prior to the proceeding in Missouri. On appeal from an adverse decision the United States abandoned this ground and maintained that the Act of April 26, 1906, which it had previously argued had no bearing on the case, was controlling and precluded the Missouri court from passing on the matter, both as to the claim and counterclaim. Again, on this question, there was an adverse ruling. The United States then conceded that the Missouri court did have jurisdiction to pass on the claim and counterclaim but maintains that the Oklahoma court should have re-examined the merits of the controversy.

We have shown that this is a matter of little import; that any claim to immunity by the Tribes was waived; that

the Act of April 26, 1906, did not confer exclusive jurisdiction; that the question as to the necessity of the trial court's re-examining the merits was waived.

Finally, the same evidence was presented to the trial court in this case as was presented to the District Court in Missouri. It is not contended by the United States in its petition for rehearing in the Circuit Court of Appeals, nor by its petition for writ of certiorari in this court that a re-examination of that evidence by the trial court would have, or could have, resulted in any other decision than that which was made in the District Court in Missouri.

We respectfully submit that the petition of the United States for writ of certiorari should be denied.

BOWER BROADDUS,
JULIAN B. FITE,
Attorneys for Respondents.